

Rolon v City of New York
2022 NY Slip Op 34205(U)
December 13, 2022
Supreme Court, New York County
Docket Number: Index No. 155707/2018
Judge: Judy H. Kim
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

<p>PRESENT: <u>HON. JUDY H. KIM</u></p> <p align="right"><i>Justice</i></p> <p>-----X</p> <p>YVETTE ROLON,</p> <p align="center">Plaintiff,</p> <p align="center">- v -</p> <p>THE CITY OF NEW YORK, NYC DEPT OF HOMELESS SERVICES, LER HOUSING FUND CORP</p> <p align="center">Defendants.</p> <p>-----X</p>	<p>PART</p> <p>INDEX NO. <u>155707/2018</u></p> <p>MOTION DATE <u>05/24/2022</u></p> <p>MOTION SEQ. NO. <u>003</u></p> <p align="center">DECISION + ORDER ON MOTION</p>
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The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 64, 65, 66 were read on this motion for JUDGMENT - SUMMARY.

On June 18, 2018, plaintiff Yvette Rolon commenced this action by summons and complaint alleging that on July 24, 2017, she tripped and fell on a defective sidewalk flag between 191 and 193 East 100th Street, sustaining injuries (NYSCEF Doc. No. 1 [Compl. at ¶8]). Plaintiff further alleges that this defective sidewalk flag was caused by the negligence and carelessness of defendants “in permitting the said area of occurrence to become broken, defective and uneven” (Id.). Photographs of the location of plaintiff’s fall show a sidewalk flag at that location sloping downward, terminating below the adjacent sidewalk flag (NYSCEF Doc. No. 52).

Defendant LER Housing Fund Corp. (“LER”) now moves, pursuant to CPLR §3212, for summary judgment dismissing the complaint and cross-claims against it. LER contends that the sidewalk flag on which plaintiff tripped abutted 191 East 100th Street, a building owned by defendant the City of New York, while the sidewalk flag abutting LER’s property, 193 East 100th

Street, is properly maintained, and therefore LER is exempt from liability under Administrative Code §7-210.

In support of its motion, LER submits, inter alia, the affidavit of LER's property manager, Jennifer Cabrera, attesting that

Upon information and belief, in 2017, LER Housing did not receive a notice regarding a defect on the sidewalk abutting 193 East 100th Street. Upon information and belief, there was no defect on the sidewalk abutting 193 East 100th Street.

LER Housing does not now, nor did it on July 24, 2017, own, operate, maintain, manage, inspect or control the City's property located at 191 East 100th Street. LER Housing never leased the City's property located at 191 East 100th Street. LER Housing never entered into any contracts providing for the operation, management, maintenance, inspection, or control of the City's property located at 191 East 100th Street.

LER Housing did not cause, create, or exacerbate a dangerous or defective condition on the public sidewalk abutting 191 East 100th Street on July 24, 2017, or at any time prior to July 24, 2017.

(NYSCEF Doc. No. 53 [Cabrera Aff. at ¶¶1, 7, 8, 11-15])

LER also submits the EBT testimony of Carlos Torres, the Superintendent of 193 East 100th Street, wherein he states that he does not work for the owners of 191 East 100th Street and that the sidewalk in front of 193 East 100th Street did not receive a violation for a broken sidewalk in the five years prior to July 24, 2017 (NYSCEF Doc. No. 51 [Torres EBT Tr. at pp. 13-14]).

Finally, LER submits the affidavit of Licensed Surveyor Saeid Jalilvand attesting that “[t]he accident area sidewalk flag is approximately 5 feet and 1 inch long. About 4 feet 10.25 inches of the sidewalk flag is located in front of 191 East 100th street (City's property). Only up to 0 feet 3 inches of the sidewalk flag is located in front of 193 East 100th street (LER Housing's property)” (NYSCEF Doc. No. 55 [Jalilvand Aff. at ¶8] [emphasis added]).

Plaintiff opposes the motion, arguing that triable issues of fact exist as to whether LER is responsible for maintaining the sunken sidewalk flag in question and whether LER properly maintained its sidewalk flag abutting the sunken sidewalk flag.

DISCUSSION

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986] [internal citations omitted]).

LER has not established its entitlement to summary judgment under Administrative Code §7-210. That statute provides, as relevant here, that:

the owner of real property abutting any sidewalk ... shall be liable for any injury to property or personal injury, including death, proximately caused by the failure of such owner to maintain such sidewalk in a reasonably safe condition. Failure to maintain such sidewalk in a reasonably safe condition shall include, but not be limited to, the negligent failure to install, construct, reconstruct, repave, repair or replace defective sidewalk flags ...

(Administrative Code §7-210[b]).

However, Administrative Code §7-210 “does not restrict a landowner’s liability for accidents that occur on its own abutting sidewalk where the landowner’s failure to comply with its duty to maintain its sidewalk in a reasonably safe condition constitutes a proximate cause of a plaintiff’s injuries” (Sangaray v W. Riv. Assoc., LLC, 26 NY3d 793, 799 [2016]). Accordingly, “[a]s part of its prima facie showing of entitlement to summary judgment” under Administrative

Code §7-210, a landowner must demonstrate both “that the alleged defect was on another landowner’s property” and “that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of plaintiff’s injuries” (Id. [internal citations omitted]). LER fails to meet either requirement.

LER has not established that the sunken sidewalk flag in question exclusively abuts 191 East 100th Street. To the contrary, the affidavit of its surveyor indicates that a segment of this sidewalk flag abuts 193 East 100th Street. Given that plaintiff’s EBT testimony—and the photographs used in connection with that testimony—indicate that plaintiff alleges that she fell on precisely this segment of the sidewalk flag (See NYSCEF Doc. Nos. 49 [Rolon EBT. Tr. at p. 38] and 52 [Rolon EBT exhibits at p. 3]), summary judgment is inappropriate.

Even ignoring the foregoing, LER has also failed to establish “that it complied with its own duty to maintain the sidewalk abutting its property in a reasonably safe condition and/or that it was not a proximate cause of plaintiff’s injuries” (Sangaray v W. Riv. Assoc., LLC, 26 NY3d 793, 799 [2016] [emphasis added]). The conclusory assertions by Cabrera and Torres that LER properly maintained the sidewalk flag abutting its property fail to satisfy LER’s burden here (See e.g., M.G. v Greater New York Corp., 2020 NY Slip Op. 34279[U], 3 [Sup Ct, Kings County 2020] [conclusory affidavits not sufficient to eliminate all triable issues of fact regarding whether alleged defective condition was within movant’s property]).

In light of the foregoing, it is

ORDERED that LER Housing Fund Corp.’s motion for summary judgment dismissing this action as against it is denied; and it is further

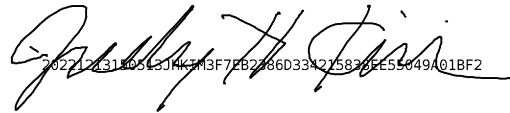
ORDERED that within twenty days of the date of this decision and order, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, upon defendants and

upon the County Clerk (60 Centre St., Room 141B) and the Clerk of the General Clerk’s Office (60 Centre St., Room 119); and it is further

ORDERED that said service upon the County Clerk and Clerk of the General Clerk’s Office shall be carried out in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on this court’s website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.



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12/13/2022
DATE

CITY TRIAL READINESS PART, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: